United Technologies Corporation, Hamilton Standard Division *and* Hartford Aircraft Lodge No. 743, International Association of Machinists and Aerospace Workers, AFL–CIO. Case 39–CA–3575

December 14, 1990

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS CRACRAFT AND DEVANEY

On June 1, 1988, Administrative Law Judge James F. Morton issued the attached decision. The General Counsel and the Charging Party filed exceptions and supporting briefs, the Respondent filed cross-exceptions, an answering brief, and a brief in support of its cross-exceptions, and the Charging Party filed an answering brief in opposition to the Respondent's cross-exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order.

In adopting the judge's finding that the Union waived its right to bargain over the increase in the length of the Saturday overtime shift from 5 to 8 hours, we have considered (1) the language in the collective-bargaining agreement's management functions clause permitting the Respondent unilaterally to determine ''shift schedules and hours of work,'' (2) the agreement as a whole (including the scope of the separate article on overtime), and (3) the parties' discussions in 1984, when the Respondent had reduced the Saturday overtime shift from 8 to 5 hours.

Unlike our dissenting colleague, we find no ambiguity in the language of the management functions clause pertaining to ''shift schedules and hours of work.'' Because it is without qualifying language, it plainly authorizes the Respondent to determine the hours of scheduled shifts whether they occur on Saturday, when employees are paid at a premium rate, or on a weekday. It is important in this regard that the Saturday overtime at issue here is not the kind of unpredictable overtime, varying from day to day or week to week, that is distinct from shift work. Employees who reported for work on a Saturday worked a regularly scheduled shift, although they were paid at a higher rate (time-and-one-half).

Contrary to our dissenting colleague, we see nothing in the ''Overtime'' article (art. XII) of the agreement that calls our reading of the management functions clause into question. That article is confined to describing the work for which premium rates will be paid, providing for equal distribution of overtime among employees who regularly perform that type of work, and determining the rate for occasions when two different premium pay rates apply to the same hours (e.g., when a paid holiday falls on Saturday). Nothing in the overtime article suggests it was intended to address, even implicitly, the matter of *when* shifts would begin or end.[2] Finally, we note that the agreement, contrary to common industry practice, contains no provision setting out any particular shift or hours-of-work schedule.[3] This omission is yet one more indication that the parties intended for the Respondent to have broad discretion in this area.

We also disagree with our dissenting colleague on the significance of the bargaining that took place in 1984, when the Respondent reduced the Saturday shift from 8 hours to 5 hours. Even assuming arguendo that a single incident of apparently voluntary bargaining over a subject specified in a management-rights clause would be sufficient to negate plain language listing the matter as a management prerogative, we do not regard the events surrounding the Respondent's 1984 implementation of a Saturday shift change as establishing that the parties had not agreed that the Respondent could make such a change unilaterally. That is, the parties' conduct at that time does not in our view render the language of the management functions clause ambiguous.

As our dissenting colleague notes, the judge found that, in 1984, after the Respondent told the Union of its desire to reduce the Saturday shift from 8 to 5 hours, representatives of the parties discussed the matter and ''reached an agreement.'' No copy of any such agreement was produced at the hearing in this case, but the judge found that the substance of the agreement reached was incorporated in a memorandum sent by John Berg, the Respondent's manager of personnel relations, to its manager of mechanical manufacturing. The Berg memorandum recites certain ''guidelines we have mutually agreed to in an effort to insure the distribution of overtime work is fairly administered within the requirements of our contractural [sic] agreement.'' Because section 2 of the ''Overtime'' article of the

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] We also note that, for the purpose of determining what rates of pay will apply on the following day, the Saturday shift was treated as analogous to the Friday shift. Thus, an employee was *not* paid time-and-a-half rates for work during the first 8 hours ''of any scheduled shift which begins on Friday and continues on Saturday''; and an employee was not paid at Sunday double-time rates for work during the first 8 hours ''of any scheduled shift beginning the preceding day and continuing into the Sunday'' (art. XII, sec. 1).

[3] See 2 *Coll. Barg., Negotiations and Contracts* (BNA) at 57:1-57:3, 57:11 (daily work schedules specified in 85 percent of surveyed collective-bargaining agreements; weekly schedules specified in 61 percent of such agreements).

collective-bargaining agreement in effect in 1984, like the one in the 1986–1989 agreement, set out certain conditions aimed at avoiding favoritism and ensuring equal distribution of overtime among qualified employees, it made sense for the Respondent to discuss the schedule change with the Union and to reach various agreements on its implementation so as to assure that the Respondent would not run afoul of the equal distribution provision. We do not view the bargaining that occurred over those agreements as inconsistent with the Respondent's right to determine the hours of the Saturday shift unilaterally.[4] Indeed, the agreements described in the Berg memorandum include the Respondent's promise that it ''will *communicate* to the Union when it becomes aware of significant scheduling problems or other emergent conditions requiring the [Respondent] to revert to the regular eight hour overtime'' (emphasis added).[5] In fact, that is what the Respondent did in 1987 when it made the change at issue here. It communicated to the Union that new conditions (problems with overdue shipments) necessitated a reversion to the former 8-hour Saturday overtime schedule.[6]

In sum, nothing in the parties' bargaining history or in other provisions of the collective-bargaining agreement suggests to us that the management functions clause meant other than what it plainly said. The Respondent possessed the ''sole right and responsibility'' to determine ''shift schedules and hours of work.'' By agreeing to that clause, the Union clearly and unmistakably waived its right to demand bargaining over the decision to change the regular Saturday shift schedule from 5 hours to 8 hours.

ORDER

The recommended Order of the administrative law judge is adopted and the complaint is dismissed.

MEMBER DEVANEY, dissenting.

My colleagues find that the Union's right to bargain over the Respondent's change of Saturday overtime hours was waived by ambiguous language in the collective-bargaining agreement's management functions clause, despite the judge's finding that the Respondent had bargained with the Union over a change in Saturday overtime hours just 3 years earlier. I would find that the Union did not waive its right to bargain and that the Respondent violated Section 8(a)(5) and (1) of the Act by unilaterally changing Saturday overtime from 5 hours to 8 hours.

The Respondent and the Union were parties to a collective-bargaining agreement effective from April 25, 1983, through April 27, 1986, and a successor agreement effective from April 28, 1986, through April 30, 1989. Both agreements contained an article entitled ''Management Functions'' that stated, in part: ''[T]he company has and will retain the sole right and responsibility to direct the operations of the company and in this connection to determine . . . shift schedules and hours of work.'' Both agreements also contained a separate article concerning overtime.

Before 1984, the Respondent operated an 8-hour overtime shift on Saturdays. In late 1983, John Berg, the Respondent's manager of personnel relations, proposed to Philip Bellico, the Union's president, that the Saturday overtime shift be reduced from 8 to 5 hours, because there were not enough employees volunteering for the 8-hour shift. Bellico met with Berg several times concerning this proposal. Ultimately, they reached agreement on a 5-hour Saturday shift after the Respondent assented to conditions addressing the Union's concerns, including retaining 8-hour overtime shifts on holiday weekends and not increasing overtime before and after shifts on weekdays. The substance of the agreement was contained in a memorandum Berg sent to the Respondent's manager of mechanical manufacturing, the second paragraph of which stated:

> as a result of . . . discussions, the Company and the Union have mutually agreed to a ninety (90) day trial period for voluntary first and second shift employees to work a five (5) hour day on Saturdays.

[4] Because we accept the judge's factual finding that the parties had reached agreements in 1984 in connection with the Respondent's reduction of the length of the Saturday shift, we are not, as our dissenting colleague states, overturning any credibility finding of the judge. We simply differ with the judge on what inferences to draw from the 1984 bargaining. As indicated above, we find that because the Respondent was legally obligated to ensure that the shift change did not result in violations of the overtime distribution provisions of the collective-bargaining agreement, it had reason to negotiate generally on the subject. The Union would be less likely to grieve, or to prevail on grievances, concerning overtime distribution if it had been involved in the institution of the reduced hours. And it made sense to set out the entire arrangement in written form. We find nothing in either the memorandum of the substance of the agreement or the credited testimony of what actually occurred that establishes that either party regarded the Respondent as having an *obligation* to bargain about every aspect of the shift change.

[5] We do not agree with the judge that par. 3 in the memorandum suggests that the Respondent thereby agreed to a 5-hour Saturday schedule. That paragraph reads as follows:

> Employees scheduled for five hours work on Saturday will not be asked to work beyond that time, except for emergent unplanned reasons. Here again, the Union is concerned the reduced Saturday overtime work hours will result in supervision making routine exceptions to the policy and allowing some favored employees to work beyond the normal five hour scheduled.

By its terms, this paragraph addresses only the circumstance of employees ''scheduled for five hours work''—not the question of changing the Saturday shift schedule for all employees at some later date. Furthermore, it is tied in with the contractual provision concerning equal distribution, which the Respondent undoubtedly wanted to avoid violating.

We similarly do not find any conflict between our reading of the management functions clause and the Berg memorandum's reference to the parties' plan to assess the ''success'' of the 5-hour Saturday schedule at the end of a 90-day period. This is consistent both with the Respondent's acknowledgement of its obligations under the equal-distribution clause and with an understandable desire to encourage employee support of the Respondent's management initiatives.

[6] By not reaching implementation agreements with the Union, as it had in 1984, the Respondent risked violating the contract's equal-distribution provision. Of course, the Union was free to file grievances if the schedule change resulted in the kinds of inequalities in overtime distribution that the provision was designed to prevent.

At the end of the 90-day trial period, the 5-hour Saturday overtime policy was retained.

The 5-hour Saturday overtime policy continued in effect until early 1987. On or about April 20, 1987, Tutch Shirane, the Respondent's manager of labor relations, telephoned Mark Bond, who was then the Union's president, and told him that employees would be notified the following day that the Saturday overtime shift for the Respondent's manufacturing operations employees was being increased from 5 hours to 8 hours, because the Respondent was having a problem with overdue shipments and needed the additional hours of work. Bond asked if the increase in Saturday overtime was negotiable, and Shirane replied that it was not. The change went into effect the following day.

The judge, whose decision my colleagues in most respects adopt, stated that, in his view, the 1984 negotiations regarding Saturday overtime showed clearly that the Respondent and the Union had never agreed in prior contract negotiations that the Respondent could unilaterally modify overtime hours. The judge nevertheless found that an earlier *United Technologies*, case[1] compelled a conclusion that the Respondent's April 1987 unilateral change in Saturday overtime from 5 hours to 8 hours did not violate the Act. According to the judge, the earlier decision had held that a prior instance in which the Respondent had bargained over a change in its disciplinary procedure for absenteeism did not compromise the Respondent's contractual right subsequently to change that disciplinary procedure unilaterally.

It is well settled that overtime constitutes a mandatory subject of bargaining.[2] Thus, the Respondent's unilateral change in Saturday overtime is a violation of the Respondent's obligation to bargain concerning a change in mandatory bargaining subject, unless the Union has waived its right to bargain over this change. To waive a statutorily protected right, however, ''the waiver must be clear and unmistakable.''[3]

I find no clear and unmistakable waiver of the Union's right to bargain over the change in Saturday overtime. The language of the management functions clause authorizing the Respondent to determine ''shift schedules and hours of work'' may well be understood as authorizing the Respondent to set unilaterally such matters as shift starting and ending times for regular weekday work shifts. The collective-bargaining agreement contains a separate article devoted entirely to the subject of overtime and the management functions clause makes no mention of overtime. The management functions language concerning ''shift schedules and hours of work'' may, therefore, reasonably be understood as applicable only to the regular workweek and not to weekend overtime. Because it is, at the very least, ambiguous whether the ''shift schedules and hours of work'' language of the management functions clause was intended to encompass weekend overtime, I cannot conclude that this language clearly and unmistakably waived the Union's statutory right to bargain over a change in Saturday overtime.[4]

Moreover, I agree with the judge that the parties' bargaining history demonstrates that both parties understood that the Union's right to bargain over changes in Saturday overtime was not waived by the management functions clause of the contract. As described above, when the Respondent wanted to change Saturday overtime from 8 hours to 5 hours in 1984, the Respondent negotiated this change with the Union.[5]

In this regard, I find this case distinguishable from the *United Technologies* decision that the judge found

[1] *United Technologies Corp.*, 287 NLRB 198 (1987).

[2] *Chef's Pantry*, 274 NLRB 775 fn. 6 (1985).

[3] *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 708 (1983).

[4] Although it is true, as my colleagues note, that neither the overtime article nor any other provision of the contract sets shift schedules, it is also beside the point. The complaint allegation is not that the Respondent, in changing Saturday overtime hours, departed from the terms of the contract. Rather, the contract is relevant only to the issue of whether the management functions clause clearly and unmistakably waived the Union's statutory right to bargain over the change in Saturday overtime hours. Thus, the absence from the contract of a provision setting forth shift schedules establishes little. The existence of a separate article concerning overtime, however, tends to show that the parties regarded overtime as a separate and distinct subject that might not be encompassed by general language in the management-rights clause concerning shift schedules and hours of work.

[5] In attempting to reconcile the Respondent's 1987 unilateral change in Saturday overtime with the parties' bargaining history, my colleagues characterize the parties' 1984 bargaining as concerning not the decision to change Saturday overtime from 8 to 5 hours but only how that decision would be implemented. In so doing, my colleagues ignore the facts found by the judge. Although, as my colleagues note, the memorandum setting forth the substance of the 1984 agreement contained guidelines to insure fair distribution of overtime work, the guidelines constitute only a portion of the memorandum. They are preceded by an explicit statement, quoted above, that the Company and the Union have ''mutually agreed'' to employees' working 5 hours overtime on Saturdays for a trial period. The judge set out the entire memorandum in his decision. Additionally, the judge noted that Union President Bellico testified that the 1984 negotiations over Saturday overtime began when Personnel Relations Manager Berg stated that ''he wanted to discuss the possibility of reducing the Saturday overtime shift from 8 hours to 5 hours.'' Berg, on the other hand, testified that he merely informed Bellico that the Respondent had ''decided to go with a 5 hour work schedule'' on Saturdays and asked Bellico if he saw any problems. Analyzing these two accounts, the judge stated:

> Were it necessary to choose between them, I would accept Bellico's. Berg's account, insofar as it may suggest that he was merely notifying Bellico of a *fait accompli* would not stand in view of the statement in his 25 January memorandum that agreement had been reached between him and Bellico.

Based on this credibility determination, among other things, the judge concluded that, ''the 1984 negotiations as to Saturday overtime show clearly that Respondent and the Union had never agreed in prior contract negotiations that Respondent could unilaterally modify overtime hours.'' In reversing this conclusion, my colleagues, without justification or acknowledgement, are overturning the judge's credibility determination and factual findings on which the conclusion was based.

A ''guideline'' in the 1984 agreement on Saturday overtime providing that the Respondent would communicate to the Union when it became aware of problems or conditions requiring reversion to 8 hours' overtime is not contrary to the judge's conclusion that the 1984 negotiations showed that the parties had not agreed that the Respondent could unilaterally modify overtime hours. This guideline merely reiterated the Respondent's statutory obligation to notify the Union when it desired to change Saturday overtime hours. Such notification, of course, is consistent with, and a prerequisite to, bargaining over such a change.

controlling. In that case, the Board found that language in the management functions clause permitting the Respondent to make rules for discipline waived the Union's right to bargain over the Respondent's change in progressive discipline procedures for absenteeism, i.e., omitting suspensions as a step in the discipline. Five or six years before that change, the Respondent had attempted to change unilaterally certain other disciplinary rules but, after unfair labor practice charges were filed, the Respondent had ultimately agreed to bargain over the rule changes as part of a settlement of the charges. The Board found that, as parties can have many different reasons for agreeing to settle unfair labor practice charges, this prior bargaining did not cast doubt on the meaning of the language in the management functions clause reserving the Respondent the right to make rules for discipline.

Unlike that case, however, the Respondent here bargained over the 1984 change in Saturday overtime without attempting to make the change unilaterally, and its offer to bargain over the change was not made under the pressure of pending unfair labor practice charges or done as a means of settling charges. Moreover, here, unlike the change in the discipline policy for absenteeism in the prior case, the earlier change over which the Respondent had willingly bargained concerned precisely the same subject as the change now at issue and occurred only 3 years before this change. Thus, contrary to the judge, in determining the Respondent's bargaining obligation here, I do not find that the weight to be given the 1984 bargaining is controlled by the Board's view of prior bargaining under dissimilar circumstances in the earlier *United Technologies* case. Rather, I find that the bargaining over the 1984 change in Saturday overtime clearly demonstrates the parties' understanding that the Union had retained its right to bargain over such a change. Accordingly, I would find that the Respondent's unilateral change in Saturday overtime in 1987 violated Section 8(a)(5) and (1) of the Act.

Michael A. Marchionese, Esq., for the General Counsel.
Philip I. Kruger, Esq., for United Technologies Corporation.
James M. Parent, representing Hartford Aircraft Lodge No. 743, International Association of Machinists and Aerospace Workers, AFL–CIO

DECISION

STATEMENT OF THE CASE

JAMES F. MORTON, Administrative Law Judge. The complaint alleges that United Technologies Corporation, Hamilton Standard Division (Respondent) has violated Section 8(a)(1) and (5) of the National Labor Relations Act (the Act) by having implemented and maintained since 30 April 1987, an 8-hour Saturday overtime policy for employees in a unit represented by Hartford Aircraft Lodge No. 743, International Association of Machinists and Aerospace Workers, AFL–CIO (the Union) without having given the Union an opportunity to bargain. Respondent, in its answer, contends that the Union, by having agreed to a broad management-rights clause in its contract with Respondent and also by its failure to request bargaining in a timely manner, had waived any right it might have to require Respondent to bargain collectively as to the changes in shift schedules and losses of work as contemplated in the general notice Respondent issued on 21 April 1997.

On the entire record, including my observation of the demeanor of the witnesses and after due consideration of the briefs filed by the General Counsel and Respondent I make the following

FINDINGS OF FACT

I. JURISDICTION AND LABOR ORGANIZATION

The pleadings establish and I thus find that Respondent manufactures and sells aerospace products and that its operations meet the Board's jurisdictional standard for nonretail concerns. The pleadings also establish and I further find that the Union is a labor organization as defined in Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICE

A. *Background*

1. Relevant contract provisions

The Union since about 31 December 1968, has represented a unit of all production and maintenance employees of Respondent at five plants in Connecticut. Article I of the collective-bargaining agreement covering these employees and which was in effect from 25 April 1983 through 27 April 1986 and article I of the successor agreement, effective through 30 April 1989, read:

Management Functions

> It is recognized that in addition to other functions and responsibilities, (Respondent) has and will retain the sole right and responsibility to direct the operations of (Respondent) and in this connection to determine the number and location of its plants; the product to be manufactured; the types of work to be performed; the assignment of all work to employees or other persons; the schedules of production; shift schedules and hours of work; the methods, processes, and means of manufacturing; and to select, hire, and demote employees, including the right to make and apply rules and regulations for discipline, efficiency, production and safety.
>
> It shall also have the right and responsibility to discharge or otherwise discipline any employee for just cause, to promote and transfer, and to lay off because of lack of work or other cause, unless otherwise hereinafter provided.
>
> Article XII of those agreements provides, inter alia, that employees will be paid at time and a half rates for Saturday work and that overtime work will be distributed equally among qualified employees.

2. The earlier change in Saturday overtime work

Respondent for years had operated an 8-hour shift on Saturdays. This shift was staffed with volunteers from the unit represented by the Union. In late 1983, Respondent was experiencing problems in getting enough volunteers for this shift.

Philip Bellico testified as follows for the General Counsel. He was president of the Union in 1983 and 1984. When he was elected president in 1983, Respondent sought a ''better relationship'' with the Union in view of the large number of outstanding grievances. In that context, Respondent's manager of personnel relations then, John Berg, called him to his office and said that he wanted to discuss the possibility of reducing the Saturday overtime shift from 8 hours to 5 hours because there were not enough volunteers to work the full shift. Bellico replied that he would talk to the employees who had just served on the union committee which earlier that year took part in negotiating the 1983–1986 agreement discussed above. Bellico related that he was met with considerable internal opposition. He informed Berg of this and, after several meetings between them, they reached an agreement which was approved first by James Botellio, Respondent's manager of mechanical manufacturing and other officials and then by the Union's executive board. The substance of that agreement is contained in a memorandum Berg sent to Botellio on 25 January 1984 which reads:

> Pursuant to your request, I have met with our Union representatives to discuss the implementation of a five hour Saturday overtime work schedule for first and second shift manufacturing department employees. During these discussions, I have attempted to impress upon the Union, the company does expect its Manufacturing Department employees will be working continuing Saturday overtime schedules throughout the year in order to meet our production commitments. They were told management of the Manufacturing Departments has, therefore, been exploring options to insure our scheduled requirements are attained, while at the same time, be cognizant of the demands protracted overtime scheduling places upon the hourly work force. Our goal, therefore, is to maintain a high degree of morale, improve our productivity during overtime work hours and meet the schedule.
>
> As a result of those discussions, the Company and the Union have mutually agreed to a ninety (90) day trial period for voluntary first and second shift employees to work a five (5) hour day on Saturdays.
>
> Listed below are guidelines we have mutually agreed to in an effort to insure the distribution of overtime work is fairly administered within the requirements of our contractural agreement.
>
> 1. The five hour Saturday overtime work schedule will be tried for ninety (90) days and its success will be assessed and considered by both parties at that time.
>
> 2. Except for emergent reasons, there will be no pre or post shift overtime work. The Union is concerned the reduced Saturday overtime work hours might result in supervision attempting to increase the number of available hours by increasing pre or post shift overtime requirements.
>
> 3. Employees scheduled for five hours work on Saturday will not be asked to work beyond that time, except for emergent unplanned reasons. Here again, the Union is concerned the reduced Saturday overtime work hours will result in supervision making routine exceptions to the policy and allowing some favored employees to work beyond the normal five hour schedule.
>
> 4. All direct manufacturing and support operations will work to the five hour schedule. Within reason, the Company will communicate to the Union when it becomes aware of significant scheduling problems or other emergent conditions requiring the Company to revert to the regular eight hour overtime.
>
> 5. Sunday, holiday and Saturday overtime work during a holiday weekend will be scheduled on an eight hour basis rather than the new five hour schedule. If supervision or the employee choose to work less than eight hours, that can be accomplished; however, the employee will at first be given the option to work a scheduled eight hour day if, in fact, eight hours work is available.
>
> 6. Immediate difficulties or problems as a result of the revised overtime schedule will be discussed between the Shop Committee and the Committee of Management at third step and will not be addressed at earlier steps of the grievance procedure.
>
> 7. To the extent currently practiced, overtime between shifts will be distributed equitably.
>
> 8. All employees affected by this change will be properly notified by their immediate supervisor of the reasons the Company and the Union mutually agreed to this change. In other words, we will simply practice good communications. I would expect shop supervision to be fully cognizant of the reasons for the change and be able to effectively communicate its benefits to our bargaining unit employees. In an effort to insure supervision is consistent with our employes, attached to this memorandum is a copy of remarks we consider appropriate for such a discussion.
>
> While we recognize some employees have a strong desire to continue working a full eight hour overtime schedule and will be disappointed with this change in procedure, we believe that a schedule change such as this, when properly communicated and fairly administered, can be perceived as a positive improvement by our bargaining unit employees. I would expect when we proceed with this change effective February 3,1984, that will be achieved.

Berg's account as to his discussion with Bellico on this subject is as follows. He told Bellico that Respondent ''had decided to go with a five hour work schedule'' and asked Bellico if he saw any problems. Bellico was cautious. Bellico and he agreed that Bellico ''would talk it among his folks and get back to us'' There was no discussion as to Respondent's decision to go to a 5-hour shift but only on two points; Respondent agreed that the Union's view that employees should receive 8 hours' pay for the 5 hours worked on a holiday was reasonable and that Respondent would solve ''an ongoing problem of a lack of equalization'' in apportioning overtime assignments. Berg related that a morale problem existed at the time and that Respondent ''didn't want to take a heavy handed approach.''

There is little difference between Bellico's and Berg's accounts. Were it necessary to choose between them, I would accept Bellico's. Berg's account, insofar as it may suggest that he was merely notifying Bellico of a fait accompli would not stand in view of the statement in his 25 January memorandum that agreement had been reached between him and Bellico.

B. *The Alleged Unlawful Change*

The 5-hour Saturday schedule remained in effect until the spring of 1987. On about 20 April 1987, the Union's president, Mark Bond, received a telephone call from Respondent's manager of labor relations informing him that Respondent would notify employees on the following day that the Saturday overtime shift in the manufacturing area was being increased from 5 to 8 hours. Bond asked Respondent if this was negotiable and was told that it was not. Bond was told that Respondent was having a problem with overdue shipments and needed the extra hours. The change was effective the next day. Bond related that the change resulted in many individual grievances because of the impact the changes had on the home lives of employees.

Respondent argues that it has litigated this same issue before the Board under the identical management-rights language appearing in another of its contracts with the International Association of Machinists and Aerospace Union, AFL–CIO. See *United Technologies Corp.*, 287 NLRB 198 (1987), where the panel majority held that Respondent's unilateral implementation of a change in its disciplinary policy for absenteeism was lawful as the management function provision of the contract granted it the right to do so. The Board there further held that a prior instance where the Respondent had bargained with the Union there respecting a change in that disciplinary procedure did not compromise Respondent's right to thereafter effect a unilateral change. In the case before me, Respondent relies on that point in support of its contention that in its negotiations in 1984 vis-a-vis Saturday overtime, it did not, in effect, waive the waiver by the Union of its right to bargain. General Counsel seeks to distinguish the holding in the 1987 decision on the ground that the management functions clause expressly mentions rules and regulations for discipline and that it does not expressly mention Saturday overtime. The clause, however expressly applies to shift schedules and hours of work. For all practical purposes, there is no distinction to be drawn.

I find that the holding of the panel majority in the 1987 case involving this same Respondent to be controlling as to the issue before me and shall therefore recommend dismissal of the complaint. The argument in General Counsel's brief rests in part on the view set out in the dissenting opinion in that case. To the extent that General Counsel may seek reconsideration of that holding, her arguments cannot be addressed to me as I am bound by the clear precedent of the decision. Ibid.

Should the Board hold that that decision is not controlling, I would then recommend that Respondent be found to have violated Section 8(a)(1) and (5) of the Act, as alleged in the complaint. Respondent had presented the Union with a fait accompli and has stated that it would not bargain. In my view, the 1984 negotiations as to Saturday overtime show clearly that Respondent and the Union had never agreed in prior contract negotiations that Respondent could unilaterally modify overtime hours. Most likely, neither side actually contemplated resolving disputes as to Saturday overtime when they negotiated the collective-bargaining agreements. I do not see how the Union could have waived a matter neither had thought of. Paragraph 3 of Berg's memorandum dated 25 January 1984, set out above, indeed suggests that Respondent agreed to a 5-hour limit; if so, its actions in April 1987 would have abrogated that agreement.

However, the Board held in *United Technologies*, supra, that one aberration does not supersede the plain language of the broad management functions clause. I therefore find that the Union had, by assenting to that clause in its collective-bargaining agreements with Respondent, waived its rights to bargain as to changes in scheduled work hours on Saturdays.

CONCLUSIONS OF LAW

1. The Respondent is an employer within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. The Respondent has not committed any unfair labor practice violative of Section 8(a)(1) and (5) of the Act.

On the foregoing finding of fact, conclusions of law, on the entire record, and pursuant to Section 10(c) of the Act, I issue the following recommended[1]

ORDER

The complaint is dismissed.

[1] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.